C (a child, applying through Chung Siew Fei, biological father) v Peguam Negara & Anor

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO KA-32–2–04 OF 2019
MAHAZAN MAT TAIB JC
1 MARCH 2021

Civil Procedure — Judicial review — Application for mandamus order — Applicant had not received decision from respondent for application for citizenship — Whether application for mandamus was premature and abuse of court process — Whether requirements for mandamus order were fulfilled — Whether applicant had exhausted all alternative remedies — Rules of Court 2012 O 53 — Specific Relief Act 1950 s 44

This was an application by originating summons filed by the applicant (through his representative father) for an order against the second respondent to re-register the applicant as a Malaysian Citizen and an order against the second respondent to re-register the applicant as a legitimate son of his biological father and his biological mother. The applicant was born on 16 April 2008 in Pulau Pinang. The birth mother held a China passport and his birth father was Malaysian. Since the mother was not a citizen and the birth father were not legally married to each other at the time of the applicant's birth, the applicant was therefore not a citizen according to s 1(a) of Part II of the Second Schedule of the Federal Constitution. The mother and the father of the applicant only registered their marriage in the Jabatan Pendaftaran Negeri Pulau Pinang on 7 July 2008, three months after the birth of the applicant. They had filed an application for legitimacy on 10 May 2013 and on 30 July 2013 the High Court then declared that the applicant was their legitimate child. On 19 September 2013, the applicant's father had submitted an application under art 15A of the Federal Constitution to the government in order to apply for the applicant to be registered for citizenship but there was no response, either from the Kementerian Dalam Negeri or the Jabatan Pendaftaran Negara. Hence, this application was filed by the applicant through an originating summons dated 9 April 2019, applying for the citizenship of the applicant. Hence, these issues were premised in this application: (a) whether the applicant had complied with the procedures under O 53 of the Rules of Court 2021 in applying for the mandamus order; and (b) whether the requirements for a mandamus order under s 44 of the Specific Relief Act had been fulfilled.

Held, dismissing the application with costs:

(1) The court found that the applicant had failed to follow the proper mode of application. Section 44 of the Specific Relief Act 1950 ('the SRA') was applicable and it was important to state that Chapter VIII (ss 44–49), Part II of the SRA must be read together with O 53 of the Rules of Court 2012 ('the ROC'). The court was of the view that the applicant should firstly make an application for Ieave from the court before proceeding to make an application for a mandamus order, as provided under O 53 r 3(1) of the ROC. However, before an applicant could go to court for leave, he must first receive a decision from the relevant authority. If he was adversely affected by the decision, he must make an application for leave within three months from the date when the decision was first communicated to him as stipulated under O 53 rr 2(4) and 3(6) of the ROC. In this case, the applicant had not received any decision from the National Registration Department concerning his application for citizenship under art 15A of the Federal Constitution, made on 19 September 2013. For this reason, the plaintiff could not succeed in obtaining the orders sought as his application was premature and an abuse of process of the court (see paras 40–43).

(2) The court was of the view that the applicant had not exhausted all alternative remedies. The applicant had failed to take the appropriate steps available before coming to court to apply for an order to register the child as a Malaysian citizen as prayed for in the originating summon (see paras 50 & 56).

[Bahasa Malaysia summary

Ini adalah permohonan melalui saman pemula yang difailkan oleh pemohon (melalui wakil bapanya) untuk mendapatkan perintah terhadap responden kedua untuk mendaftarkan semula pemohon sebagai warganegara Malaysia dan perintah terhadap responden kedua untuk mendaftarkan semula pemohon sebagai anak bapa kandungnya yang sah dan ibu kandungnya. Pemohon telah dilahirkan pada 16 April 2008 di Pulau Pinang. Ibu kandung memegang pasport China dan bapa kandungnya adalah rakyat Malaysia. Oleh kerana ibunya bukan warganegara dan bapa kandung tidak berkahwin secara sah antara satu sama lain pada masa kelahiran pemohon, pemohon itu bukan warganegara mengikut s 1(a) Bahagian II Jadual Kedua Perlembagaan Persekutuan. Ibu dan bapa pemohon hanya mendaftarkan perkahwinan mereka di Jabatan Pendaftaran Negeri Pulau Pinang pada 7 Julai 2008, tiga bulan selepas tarikh kelahiran pemohon. Mereka telah memfailkan permohonan legitimasi pada 10 Mei 2013 dan pada 30 Julai 2013 Mahkamah Tinggi kemudian mengisytiharkan bahawa pemohon adalah anak mereka yang sah. Pada 19 September 2013, bapa pemohon telah mengemukakan permohonan di bawah perkara 15A Perlembagaan Persekutuan kepada kerajaan untuk memohon pemohon didaftarkan kewarganegaraan namun tiada maklum balas diterima, sama ada daripada Kementerian Dalam Negeri

A atau Jabatan Pendaftaran Negara. Oleh itu, permohonan ini telah difailkan oleh pemohon melalui saman pemula bertarikh 9 April 2019 untuk memohon kewarganegaraan pemohon. Oleh itu, isu-isu ini telah dikemukakan dalam permohonan ini: (a) sama ada pemohon telah mematuhi prosedur di bawah A 53 Kaedah-Kaedah Mahkamah 2021 dalam memohon perintah mandamus; B dan (b) sama ada keperluan bagi perintah mandamus di bawah s 44 Akta Relief Spesifik 1950 telah dipenuhi.

Diputuskan, menolak permohonan dengan kos:

C (1) Mahkamah ini mendapati bahawa pemohon telah gagal mematuhi prosedur permohonan yang betul. Seksyen 44 Akta Relief Spesifik 1950 ('ARS') adalah terpakai dan VIII (ss 44–49), Bahagian II ARS hendaklah dibaca bersama dengan A 53 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Mahkamah ini berpendapat bahawa pemohon hendaklah D terlebih dahulu membuat permohonan kebenaran dari mahkamah sebelum meneruskan permohonan perintah mandamus, seperti yang diperuntukkan di bawah A 53 k 3(1) KKM 2012. Walau bagaimanapun, sebelum pemohon permohonan di mahkamah, pemohon hendaklah terlebih dahulu menerima keputusan daripada pihak berkuasa. Sekiranya E permohon terjejas dengan keputusan itu, barulah pemohon mempunyai hak untuk memohon semakan kehakiman dalam tempoh tiga bulan dari tarikh keputusan mula-mula dimaklumkan kepadanya seperti yang ditetapkan di bawah A 53 kk 2(4) dan 3(6) KKM. Di dalam kes ini, F pemohon belum menerima apa-apa keputusan daripada Jabatan Pendaftaran Negara mengenai permohonannya untuk mendapatkan kewarganegaraan di bawah perkara 15A Perlembagaan Persekutuan yang dipohon pada 19 September 2013. Atas alasan ini, permohonan plaintif ini tidak boleh dibenarkan kerana permohonan ini adalah pramatang G dan merupakan suatu penyalahgunaan proses mahkamah (lihat perenggan 40–43).

(2) Mahkamah ini berpendapat bahawa pemohon tidak menggunakan semua remedi alternatif. Pemohon telah gagal mengambil langkah sewajarnya sebelum datang ke mahkamah untuk memohon perintah H mendaftarkan kanak-kanak itu sebagai warganegara Malaysia seperti yang dipohon di dalam saman pemula (lihat perenggan 50 & 56).]

Cases referred to

Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors [1999] I 2 MLJ 385; [1999] 8 CLJ 37, HC (refd)

Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia [2016] 7 MLJ 717, HC (refd)

Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child)

v Ketua Pendaftar Kelahiran dan Kematian, Malaysia [2012] 9 MLJ 573, HC (refd)
Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others [2007] 8 MLJ 1, HC (refd)
Ho Kooi Sang v Universiti Malaya [2004] 2 MLJ 516; [2004] 5 CLJ 445, HC (refd)
Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd [2017] 2 MLJ 197; [2017] 5 CLJ 283, CA (refd)
Keysight Technologies Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri Malaysia [2018] MLJU 66, HC (refd)
Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)
Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 8 MLJ 122, HC (refd)
M & W Zander (M) Sdn Bhd v Director General of Inland Revenue [2005] MLJU 669; [2005] 6 CLJ 336, HC (refd)
Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors [2018] 1 MLJ 307, CA (refd)
Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child) [2017] 3 MLJ 308, CA (refd)
Nedunchelian V Uthiradam v Nurshafiqah Mah Singai Annal & Ors [2003] MLJU 842; [2005] 2 CLJ 306, HC (refd)
Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457, FC (refd)
Rosli bin Yang Danian v Datuk Mohd Zain bin Mohd Dom & Ors [2016] 9 MLJ 669, HC (refd)
Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346; [1987] 2 CLJ 199, SC (refd)
Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor [2004] 2 MLJ 648; [2004] 2 CLJ 416, HC (refd)
Thein Tham Sang v United States Army Medical Research Unit & Anor [1983] 1 MLJ 97 (refd)
Tiffany Chau v Jabatan Imigresen Malaysia & Anor [2020] 8 MLJ 503; [2020] 2 CLJ 715, HC (refd)

Legislation referred to

Births and Deaths Registration Act 1957 ss 7, 13
Federal Constitution arts 14(1)(b), 15A, 160, Second Schedule, Part II, s 1(a), Part III, ss 2, 17
Legitimacy Act 1961 ss 3, 4
Rules of Court 2012 O 53, O 53 rr 1(2), 2(4), 3(1), 3(6)
Specific Relief Act 1950 ss 44, 44(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), 45, 46, 47, 48, 49, Part II, Chapter VIII

Andy Ooi (Sharifah, Ooi & Co) for the applicant.
Aliza bt Jamaludin (Kedah State Legal Advisor's Office) for the defendants.

Mahazan Mat Taib JC:

INTRODUCTION

[1] This is an application by the applicant through originating summons dated 9 April 2019 for the following reliefs:

(a) an order against the second respondent to re-register Child C as a Malaysian Citizen; and

(b) an order against the second respondent to re-register Child C as a legitimate son of his biological father Chung Siew Fei (NRIC No 74021–07–5509) and the biological mother Peng Qinghua (China Passport No G38960530).

[2] Having perused all the affidavits related to the application, the written submissions filed and having heard the oral submission by both parties I have dismissed the application with costs of RM2,000. The applicant then filed an appeal against the decision.

These are my full grounds for the decision.

THE CAUSE PAPERS

[3] The relevant cause papers are as follows:

(a) originating summons dated 9 April 2019 (encl 1);

(b) affidavit in support of the application affirmed on 8 April 2019 (encl 2);

(c) affidavit in reply by the respondents affirmed on 23 May 2019 (encl 31); and

(d) affidavit in reply by the applicant affirmed on 18 June 2019 (encl 5).

Both parties have also filed their written submissions, supplemental submissions and replies to the submissions, accordingly.

BACKGROUND OF THE CASE

[4] In order to have a proper understanding of this application, it is necessary for me to trace the litigation history of this suit in brief.

[5] The child, was born on 16 April 2008 in Pulau Pinang. The birth mother, Peng Qinghua holds a China Passport No G09577300 and the person

to be the birth father as per s 13 of the Births and Deaths Registration 1957 is Chung Siew Fei (NRIC No 740721–07–5509). It is to be noted that Jabatan Kimia Malaysia through an official DNA report dated 24 January 2018 has confirmed that Chung Siew Fai is the biological father and mother of the child.

[6] Since the mother Peng Qinghua is not a citizen and the birth father Chung Siew Fei were not legally married to each other at the time of the child's birth, the child is therefore not a citizen according to s 1(a) of Part II of Second Schedule of the Federal Constitution.

[7] The mother and the father of the child only registered their marriage in the Jabatan Pendaftaran Negeri Pulau Pinang on 7 July 2008, three months after the birth of the child. They have filed in an application for legitimacy on 10 May 2013 and on the 30 July 2013 the High Court then declared that the child is the legitimate child of Chung Siew Fai and Peng Qinghua. After the marriage was registered, on 15 January 2018 the couple then have another twin girls.

[8] On 19 September 2013 Chung Siew Fai, the father had submitted an application under art 15A of the Federal Constitution to the Government in order to apply for the child to be registered for citizenship but to no response, either from the Kementerian Dalam Negeri or the Jabatan Pendaftaran Negara. Hence this application was filed by the applicant through originating summons dated 9 April 2019, applying for the citizenship of the child.

THE APPLICANT'S CASE

[9] The applicant submitted that this application is moved specifically under art 14(1)(b) of the Federal Constitution to be read with s 1(a), Part II, Second Schedule of the Federal Constitution ie to claim citizenship by operation of law:

(a) Article 14(1)(b) states:

> 14 Citizenship by operation of law
>
> (1) Subject to the provision of this Part, the following persons are citizens by operation of law, that is to say:
>
> (b) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provision contained in Part 1 of the Second Schedule; and
>
> (c) *every person born on or after Malaysia Day, and having any of the qualifications specified in part II of the Second Schedule.*

(a) Second Schedule Part II s 1(a) states:

A Subject to the provisions of Part III of this Constitution the following persons born on or after Malaysia Day are citizens by *operation of law,* that is to say;

(b) every person born within the Federation of whose parents one at least is at the time of his birth either a citizen or permanently resident in the Federation;

B

(c) ...

[10] The applicant has cited the case of *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573, where the words of 'operation of law' was explained by the learned judge in her judgment:

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> A person who meets all the criteria therein would qualify to become a citizen under that provision. There is no room for an exercise of discretion under art 14 The test to be applied is whether a person qualifies all the necessary requirements of art 14. Once the requisite conditions under these provision are met it is automatic that a person is a citizen *by operation of law.*

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[11] The applicant argued that there are two aspects to the acquisition of citizenship by operation of law. Firstly, there is no room for any discretion and secondly, once all the requisite requirement are met, the person is automatically a citizen.

E

[12] The applicant based his arguments on the facts that since:

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(a) the child were born in the Federation of Malaysia, thus the *jus soli* qualification set out at s 1(a) of Part II, Second Schedule is fulfilled; and

(b) the DNA findings has proven that Chung Siew Fai is the biological father of Chung Siew Fai who is a citizen of Malaysia at the time of the child's birth, hence aptly fulfilling the condition set out at s 1(a) of Part II, Second Schedule.

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[13] The applicant submitted that being the biological father of the child, who is the citizen of Malaysia at the time of the child's birth, eventhough his mother and his father were not married to each other at the time he was born, does not alter or diminish their capacities as parents of the children.

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[14] Further, the applicant argued that the issue of legitimacy of the child is no longer in question since the legitimation was taken into effect by the subsequent marriage of their parents on 7 July 2008, three months after the child was born. The application for the legitimation which was filed on 10 May 2013, was allowed and the High Court then declared on the 30 July 2013 that the child is the legitimate child of Chung Siew Fai and Peng Qinghua.

I

[15] The applicant further submitted that s 17 of Part III of the Second Schedule of the Federal Constitution does not apply to this child's case because he is currently legitimate and it is the prevailing status of legitimacy. Section 17 provides that in relation to a person who is illegitimate, a reference to the person's father or parent is to be construed as a reference to the person's mother. Section 17 reads:

> 17. For the purpose of Part III of this Constitution references to a person's father or to his parent, or to one of his parents, are in relation to a person who *is* illegitimate to be construed reference to his mother, and accordingly section 19 of this Schedules shall not apply to such a person.

[16] The applicant relied on the case of *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors* [2018] 1 MLJ 307 whereby the Court of Appeal (Mary Lim JCA) has ruled that the subsequent marriage of the mother and father of the child has legitimised the child and in the judgment, the usage of the word 'is' is to indicate the intention of the law to be drafted in the present tense which means that only applies to person who 'is' illegitimate. Since the child in this case was already being legitimised by the marriage of the parents, the child 'is' legitimate. Therefore, as a legitimate person, s 17 does not apply to the child in this case, hence he is entitled to rely on the father's citizenship and clearly fulfilled the requirements of art 14(1)(b) read with s 1(a) of Part II of the Second Schedule.

[17] On the issue of whether the application is premature, the applicant submitted that since the Federal Government did not exercise its prerogative, it cannot prevent the court from considering their application. The applicant has submitted an application under art 15A of the Federal Constitution to the Government on 19 September 2013 but to no response. Article 15A states:

> Subject to Article 18, the Federal Government may, in such special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen.

THE RESPONDENT'S CASE

[18] The respondent objected to this application for several reasons as follows:

(a) the first respondent was wrongly name as a party;

(b) the applicant has not fulfilled the requirement under art 14(1)(b) of the Federal Constitution read together with s 1(a) of Part II of the Second Schedule of the Federal Constitution;

(c) the order sought for by the applicant is a non-justiciable matter; and

(d) the order sought for is by way of mandamus order which the applicant has failed to fulfil its condition.

[19] The respondent submitted that *Peguam Negara Malaysia* who has been named as the first respondent has never been deposed in any of the affidavits by the applicant on its conduct or omission from the facts right towards the decision making process. There is no legal justification to which the applicant is relying on and that the first respondent has nothing to do with the decision to grant citizenship or otherwise,

[20] Therefore, it was submitted that the action against the first respondent to be struck out for want of prosecution. The respondent cited the case of *Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors* [1999] 2 MLJ 385; [1999] 8 CLJ 37 where the learned High Court Judge decided to struck out an action with no legal justification.

[21] On the second and third reasons for the objection, the respondent submitted that the applicant's claim failed to fulfil the conditions and requirement stated art 14(1)(b) of the Federal Constitution, read together with s 1(a) Part II Second Schedule of the Federal Constitution on the citizenship acquired by operation of law. The respondent also submitted that this issue is a non justiciable matter on which this court does not have any jurisdiction to hear the matter as provided for under s 2 Part III Second Schedule of the Federal Constitution.

[22] The respondent submitted that the requirements based on both provisions art 14(1)(b) of the Federal Constitution and s 1(a) Part II Second Schedule of the Federal Constitution maybe summarised as follows:

(a) every person born within the Federation; and

(b) whose parents one at least at the time of the birth either a citizen or permanently resident in the Federation.

[23] The respondent's argument on this issue is that both provisions indicate clearly that the origin of the paternal and maternal side must be ascertained and also the existence of marriage with valid registration besides the place of birth. The key word in the provision is 'at the time of birth':

> (a) every person born within the Federation of whose parents one at least is *at the time of his birth* either a citizen or permanently resident in the Federation;

[24] Who are the parents at the time of birth, within the definition of s 1 of Part II Second Schedule? The respondent has submitted two cases for that matter, ie *Nedunchelian V Uthiradam v Nurshafiqah Mah Singai Annal &*

Ors [2003] MLJU 842; [2005] 2 CLJ 306 and *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648; [2004] 2 CLJ 416. In these two cases cited, the literal meaning of parents was given according to the dictionary meaning as well as the issue of translating the word 'parents' into Malay language as mentioned in the art 160 of the English version of the Federal Constitution. However, in his submission, the respondent submitted that in law, the lawful parent refers to biological father and mother in a valid marriage. This is based on s 13 of the Births and Deaths Registration Act 1957 which states:

> 13 Provisions as to father of illegitimate child
>
> Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother.

[25] The respondent further submitted that, before the conferment of citizenship under art 14(1)(b) of the Federal Constitution and s 1(a), Part II, Second Schedule of the Federal Constitution, the provisions in ss 3 and 4 of the Legitimacy Act 1961 need to be lookrd at. Section 3 provides the conditions to be fulfilled before a person entitled to be considered for the legitimation. Section 3 is on the relevant laws governing the solemnisation of marriage and s 4 is on the legitimation by subsequent marriage of parents.

[26] Therefore, citizenship under art 14(1)(b) will only be conferred to a child when there is a legally solemnised marriage between the father and the mother, and anyone of them is a citizen, and if the marriage is solemnised after the birth of the child, the legitimacy of a child starts only from the date of the marriage. The respondent argued that s 17 of Part III of the Second Schedule of the Federal Constitution has to be read together with art 14(1)(b) of the Federal Constitution and s 1(a) Part II Second Schedule of the Federal Constitution, hence the words 'whose parents one at least' in that section must be substituted with the word 'mother' in the applicant's case.

[27] There was no evidence furnished by the applicant to establish that the biological father of the applicant is married to the applicant's biological mother at the time of birth as required under ss 3 and 4 of the Legitimacy Act 1961. It is undisputed facts that they were not married. The respondent had brought few supporting authorities relating to the issue of the word 'parents' and the indication of the right of *jus soli* in order to determine the right to citizenship. The cases referred to are *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia*, *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara*

& Ors [2017] 8 MLJ 122 and *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717 and the case of *Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others* [2007] 8 MLJ 1.

[28] As for the *Madhuvita*'s case which was highlighted by the applicant The respondent's argument on that issue, is that the Court of Appeal failed to appreciate the provision of s 1(a) Part II Second Schedule which requires 'at the time of birth' to be a legitimate child to make her entities to follow her father's citizenship. The respondent submitted that the *Madhuvita*'s case has to be carefully applied in the matter peculiar to its own facts and shall not be applicable to other courts' decision. It must be noted that in that case, the application was made under art 15A of the Federal Constitution and was turn down by the Home Ministry whereas in the case before this court, the application under art 15A was made and the reply is still pending from the Home Ministry.

[29] The respondent has also submitted that the decision under Part III of the Federal Constitution is a matter that is non-justiciable as provided under s 2, Part III, Second Schedule of the Federal Constitution. Hence, the respondent submitted that this court is oust of jurisdiction to hear the matter.

[30] The final reason for the respondent's objection is that the order sought for is by way of mandamus order which the applicant has failed to fulfil its condition.

[31] It is the submission by the respondent that the orders sought by the applicant in this case are in the manner of mandamus order against the Government which is dealt specifically by Specific Relief Act 1950 ('the SRA'). In Chapter VIII of Part II of the Specific Relief Act 1950 governs the performance of public duties. Section 44 Specific Relief Act 1950 provides as follows:

> 44(1) A Judge make an order requiring any specific act to be done ... by any person holding a public office:
>
> Provided that —
>
> (a) An application for such an order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
>
> (b) Such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character; or on the corporation in its corporate character;
>
> (c) In the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) The Applicant has no other specific and adequate legal remedy

(e) The remedy given by the order applied for will be complete.

[32] The respondent has submitted few cases on this, as in the case of *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b where Sharma J held that the five conditions laid down in s 44 of the SRA are cumulative and must be fulfilled. The respondent submitted that the applicant has failed to bring his case under the purview of s 44 when he fails to satisfy the requirements of s 44(1) of the SRA 1950. Issue on locus standi was also raised by the respondent in an application for an order of mandamus. The case referred to was *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346; [1987] 2 CLJ 199. The learned judge in that case said:

> Then there is the important question of the appellant's standing. He must have a specific legal right to ask the Court to exercise its discretion to issue the order of mandamus. Such discretion must be exercised judicially, if the appellant has no such right then he is not entitled to mandamus.

[33] In *Ho Kooi Sang v Universiti Malaya* [2004] 2 MLJ 516; [2004] 5 CLJ 445, Justice Wan Arfah said:

> Following the judgment in *Koon Hoi Chow v Pretam Singh*, a personal right would mean a clear and specific legal right to the relief sought. In our case, there was no evidence before me whether he had a legal right under the said Act.

[34] Following these authorities, the respondent submitted that:

(a) The Applicant failed to prove before this Honourable Court on the requirements provided for under art 14(1)(b) of the Federal Constitution read together with art 1, section 1 of Part II Second Schedule and Part III of Second Schedule of the Federal Constitution; and

(b) Any decision made on citizenship cannot be reviewed or appealed at all under Part III Second Schedule of the Federal Constitution.

[35] The respondent submitted that the applicant has failed to show that he falls within the ambit of proviso (a) to s 44(1) of the SRA 1950 in order to pass the threshold issue of locus standi. Reference was also made to s 7 of the Births and Deaths Registration Act 1957 that whilst the respondent has a legal duty under s 7 of the Act, the applicant does not have a clear and legal right (as Malaysian citizens) as to compel the respondents to perform its duty under the aforementioned provision. Mere fact that being a biological father is insufficient to fulfil the threshold to be granted a mandamus order.

[36] The second hurdle laid down by s 44(1)(d) of the SRA 1950 which involved directly the need of exhausting all available remedy namely that the

applicant has no other specific and adequate legal remedy. For this, the respondent has referred to the case of *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)* [2017] 3 MLJ 308. In this case, the Court of Appeal has stated that:

> We noted too that he had written to respondent on that avenue but the request was turned away without it being considered by the honourable Minister. That would mean his request had not been subject to the honourable Minister's consideration. In other words, he had not exhausted his available avenue for redress. That revenue is stilt available for him to explore.

[37] In conclusion, the respondent submitted that the applicant has failed to satisfy the basic requirement to avail himself of the mandamus order and not entitle to one.

FINDINGS OF THE COURT

[38] I have perused all the cause papers and I have read and heard the submissions from both the applicants and the respondent. For the understanding of the material facts and the whole issues raised in this application, I have summarised the submissions from the applicant and the respondent as stated above. I have decided that the real issue involved here is on the mode of application and for that reason, I do not wish to go further on the merits of the application.

[39] It must be noted that from the prayers, the proper order to be sought is an order of mandamus. A mandamus order is an order issued by the court requiring an authority to perform a public duty placed upon it by law.

[40] As I have dismissed the application on the reason that the applicant have failed to follow the proper mode of application, I shall give the reasons for the dismissal of the application as stated below.

Failure to follow procedures under O 53 of the Rules of Court 2012

[41] In this case, s 44 of the Specific Relief Act 1950 (Act 137) ('SRA') is applicable and it is important to state that Chapter VIII (ss 44–49), Part II of the SRA must be read together with O 53 of the RC. For the purpose of this case, the relevant provisions are as follows:

(a) O 53 r 1(2): This Order is subject to the provisions of Chapter VIII of Part II of the Specific Relief Act 1950 (Act 137);

(b) O 53 r 2(4): Any person who is adversely affected by the decision of any public authority shall be entitled to make the application;

(c) O 53 r 3(1): An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule; and

(d) O 53 r 3(6): An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

[42] The applicant should firstly make an application for leave from the court before proceeding to make application for mandamus order, as provided under O 53 r 3(1). However, before an applicant can go to court for leave, *he must first receive a decision from the relevant authority. If he is adversely affected by the decision, he must make an appiication for leave within three months from the date when the decision is first communicated to him. This is as per O 53 rr 2(4) and 3(6).*

[43] In this case, the applicant *has not received any decision from National Registration Department concerning his application for citizenship under art 15A of the Federal Constitution ('the FC'), made on 19 September 2013*. For this reason, the plaintiff cannot succeed in obtaining the orders sought as his application is premature and an abuse of process of court.

[44] I refer to few cases related to this issue.

[45] In the case of *Keysight Technologies Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri Malaysia* [2018] MLJU 66, at paras 18–20 and paras 24–27, Azizah Nawawi J held as follows:

> [18] Therefore, in order to invoke the judicial review powers of the court under O 53 r 2(4), there must first be a decision by a decision maker (DGIR) or a refusal by him to make a decision, and, that decision must affect the aggrieved party (the applicant) by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy (see *Council of Civil Service Union & Ors v Minister for Civil Service* [1984] 3 All ER 935).

[46] In *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197; [2017] 5 CLJ 283, the Court of Appeal held as follows:

> [9] It is a principle which remains a good and trite law that certiorari will lie to quash a decision which has already been made by a public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice or where there is an error of law on the face of the decision of the public authority (see *Malaysian Court Practice* (2007) Desk Ed) at p 670). For a decision to be quashed on judicial review or susceptible to the court's reviewing powers, there must first be a decision by a decision maker, and that decision must affect the aggrieved party by either altering the rights or obligations or depriving him of the benefits which he has been

> permitted to enjoy (*Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2011] 6 MLJ 490; *Council of Civil Service Union & Ors v Minister for Civil Service* [1984] 3 All ER 935). Clearly, the law we apprehend ... there must first be shown that a requisite decision by the appellant as a public authority had been made before the application could come within the bounds of O 53 of the ROC 2012. It is therefore open to the appellant to argue and for this court to hold, based on this principle, that certiorari will not tie to quash a decision if no such decision has been made by the public authority. This was the decisive point at issue that was canvassed before this court). (Emphasis added.)

[47] In *M & W Zander (M) Sdn Bhd v Director General of Inland Revenue* [2005] MLJU 669; [2005] 6 CLJ 336 the same position was taken. In this case, no notice of assessment of income tax has been issued by the DGIR. As such, the DGIR has not made a decision which affects the taxpayer under the Income Tax Act 1967. At p 348, Justice Skinner said as follows:

> Reverting to the issue at hand, in my judgment it must follow that unless the applicant can show that the Director General has made a 'decision' within the meaning of that word in sub-r (4) of O 53 r 2, the applicant does not pass the threshold test because the applicant cannot then be said to have an arguable case which needs further investigation on a full inter parte basis, nor does it have a sufficient interest since it is not 'adversely affected' by the decision of a public authority.

[48] The same case of *M & W Zander (M) Sdn Bhd v Director General of Inland Revenue* was cited with approval by the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* where the court held as follows:

> [14] The next essential point which we would like to make is that there was no assessment made by the appellant in the letter of findings. We had been referred to the case of *M & W Zander (M) Sdn Bhd v Director General of Inland Revenue* [2005] MLJU 669; [2005] 6 CLJ 336 in which it was argued by the respondent that:
>
> (a) the Director General had not made nor issued any notice of assessment of income tax against the applicant and neither had any assertion been made by the applicant in its application that the Director General had made any decision in that regard;
>
> (b) to invoke the judicial review powers of the court under O 53 of the of High Court 1980, there must first be a decision by a decision maker or a refusal by him to make a decision;
>
> (c) there being no decision of the Director General before the court in the sense that no assessment had been made by him, the applicant had not been adversely affected by any decision of the Director General which was amenable to review by the court. Accordingly, the applicant was not an

'aggrieved person', within the meaning of O 53 r 2(4) and therefore had no locus standi to make this application;

(d) the applicant's application for leave was premature as the Director General had not made any assessment on the applicant's chargeable income; and

(e) it would be premature for the court to intervene at this stage and pre-empt the Special Commissioners from performing their statutory function of adjudicating any dispute that may arise between a taxpayer and the Director General.

[15] The learned judge in the above case accepted the above contentions and decided that the action of the respondent in computing the applicant's chargeable income on certain principles and its refusal to budge from those principles did not resemble a decision within the meaning of O 53 r 2(4) of the of High Court 1980. The applicant had not acquired any status or right against the respondent which required to be protected by declaratory orders. In the absence of a decision by the respondent, the applicant not only lacked a sufficient interest or locus standi to make the application, but that its application was premature. We accept that for there to be a judicial review of executive action under O 53 of the ROC 2012, there must first be a decision by the public authority. That, we discern, is the statutory requirement and well established legal principle repeated and applied by our courts. Applying the above decision, of which we were entirely in agreement, we would hold that in the absence of a decision by the appellant, the respondent not only lacked a sufficient interest or locus standi to make the application, but that its application was patently premature. More significantly, we would say that, as the audit findings and issues stated in the letter of findings did not resemble a decision, there was consequently no decision from which this court could justifiably say that the respondent was adversely affected and thus order it to be quashed. The learned judge had erroneously found that the letter of findings was a decision and hence the application was not filed prematurely. We could not therefore accede to the argument urged for the respondent that as the language of the letter of findings was very clear the application was not premature.

[49] In the case of *Rosli bin Yang Danian v Datuk Mohd Zain bin Mohd Dom & Ors* [2016] 9 MLJ 669, at paras 8 and 10–15, Noorin Badaruddin JC held as follows:

[8] This court agreed with the argument raised by the defendants that the plaintiff should have filed the application by way of judicial review under O 53 of the Rules of Court 2012 ('the ROC 2012'). This court found that by filing the writ of summons and statement of claim, the plaintiff's action had abused the process of the court and ought to be struck out.

[9] ...

[10] Obviously, the conditions laid down by O 53 of the ROC 2012 are very stringent and any attempt to circumvent these conditions by filing a different mode of application apart from the said order must be seen as an abuse process of the court. The plaintiff's action by filing the writ of summons and statement of claim was a deliberate attempt to circumvent the stringent requirements enumerated in

A O 53 of the ROC 2012. As there is an explicit procedure created to cater for this purpose, then the plaintiff should have adhered to the requirement for such relief and the action must commence according to what was prescribed by O 53 of the ROC 2012. The plaintiff's claim was solely on substantive principles of public law and therefore the appropriate process should be by way of O 53 of the ROC 2012.

B

Failure to fulfil requirements under s 44 of the SRA

[50] Before a mandamus order can be granted by a court, the applicant must fulfil all requirements under sub-s 4(1) of SRA, specifically as underlined in provisos (a)–(e). That is to say, the applicant must show that:

C

(a) his property, franchise or personal right would be injured by the doing or forbearing of a specific act;

(b) the doing or forbearing is obligatory under any law for the time being in force;

D

(c) the judge is of the opinion that the doing or forbearing is in consonance with right and justice;

(d) there is no other legal remedy; and

E

(e) the remedy given by the order applied for will be complete.

[51] This matter has been highlighted in the case of *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b at p 182, where Sharma J stated as follows:

F

> There are four prerequisites essential to the issue of an order under s 44 or of a mandamus:
>
> (1) Whether the applicant has a clear and specific legal right to the relief sought;
>
> G
>
> (2) Whether there is a duty imposed by law on the respondent;
>
> (3) Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and
>
> (4) Whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.
>
> H
>
> These are the questions, but only some of the questions, which are necessary to be answered in every application for mandamus. The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent.

I

[52] The principle in *Koon Hoi Chow*'s case regarding the requirements under sub-s 44(1) is followed in *Thein Tham Sang v United States Army Medical*

Research Unit & Anor [1983] 1 MLJ 97 at p 99, where Hashim Yeop A Sani J states that:

> It seems to be settled law that before an order under s 44(1) of the Specific Relief Act 1950 can be issued the conditions described in the proviso to that section must be fulfilled. It also seems to be settled that the five conditions are cumulative in effect and that all of them need to be fulfilled.
>
> In this case, the applicant fails to fulfil the requirement of proviso (d) that is he has no other specific and adequate legal remedy. The alternative remedy here is art 15A of the FC. The applicant has not exhausted his avenue for redress as his application for citizenship by way of registration under the said Article is pending determination.

[53] In the case of *Tiffany Chau v Jabatan Imigresen Malaysia & Anor* [2020] 8 MLJ 503; [2020] 2 CLJ 715, paras 35–37 and 40, Hashim Hamzah J held that:

> [35] On this issue, it was submitted by the learned SFC, to which I agree that the applicant had not exhausted the remedy under the Immigration Act 1959/63 since the applicant had appealed against the decision of the first respondent to Minister of Home Affairs which was pending for determination. This fact was not disputed by the applicant.
>
> [36] The Federal Court in the case of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1 had in no uncertain terms held that the right of the applicant to come to court only arises once the applicant had availed herself of any remedy laid down by the law. The Federal Court held in the following words:
>
> > [58] To dispel any fear of a taxpayer, merely because he has to face such an awesome body in the form of the government, Gill FJ in *Sun Man Tobacco Co vGovernment of Malaysia* [1973] 2 MLJ 163; [1973] 1 LNS 144 had occasion to state:
> >
> > The doors of justice are not shut to him merely because its claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a nonjudicial manner. *It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.* (Emphasis added.)

[54] *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717 at para 158, it was held by Collin Sequerah JC that:

> [158] in the premises, I find that the applicant has failed to exhaust the alternative remedy open to her of applying for citizenship of the child by way of registration pursuant to art 15A of the Constitution. Not having exhausted this window of

avenue, it is premature for the applicant to contend that the child is rendered 'stateless'. She has not therefore brought herself within the enabling provisions of s 44 of the Specific Relief Act 1950.

[55] In the case of *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457 at para 22, Justice Heliliah Mohd Yusof FCJ held that:

> [22] ... The appellant requested the High Court to invoke its residual powers and as succinctly stated by Sir John Donaldson MR in *R v Epping and Harlow General Commissioners, ex parte Goldstraw* [1983] 3 All ER 257:
>
> > But it is a cardinal principle that, save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.

[56] In the premises, I find that the applicant in this case had failed to take the appropriate steps available before coming to court to apply for an order to register the child as a Malaysian citizen as prayed for in the originating summon. I hereby dismissed the application with cost of RM2,000.

Application dismissed with costs.

Reported by Muhamad Azham Marwan